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IN THE

Supreme Court of the United States

No. [redacted]6, ORIGINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Brief of Amicus Curiae in Opposition to the Government's Petition for the Entry of a Supplemental Decree.

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IN THE

Supreme Court of the United States

No. 12, ORIGINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

Brief of Amicus Curiae in Opposition to the Government's Petition for the Entry of a Supplemental Decree.

This brief is filed with permission of this Honorable Court by *amicus curiae* in opposition to the proposal of the United States.

The petition of the United States prays for an adjudication by this Court of the boundary line between the property admittedly owned by the States, or its grantees, and that claimed by the United States.

Questions to Be Decided.

The fixation of the boundary line calls for a decision on the following mixed questions of law and fact:

(1) A determination *in situ* of the boundary line between the waters of the open sea and the inland waters.

To make this determination it will be necessary to apply, factually, to each parcel of land the incidence of the legal

concept of headland to headland as it may be defined by the Court.

(2) A determination *in situ* of the line of ordinary low tide.

To make this determination it will be necessary to find, factually, for each parcel of land in question, where the line actually was on the critical date which the Court finds controlling; how this line has been affected since that date by accretion, both natural and artificial, and by the periodical rise and fall of the land masses adjacent thereto*

(3) Many wells at or near the boundary line, as it may finally be adjudicated, have deviated, either with intent or inadvertently, from their surface position and the bottom of each of these wells must be decided.

The Questions Cannot Be Decided Without Giving All Occupants a Trial by Jury.

The United States, in this proceeding, is asking the Court to determine the law and the facts as above recited without making persons *in possessio pedis* of the area, claiming the same in good faith and with color of title, parties, and giving them an opportunity to be heard.

We respectfully submit that the position of the United States is untenable for the following reasons:

1. To determine the boundary line of property in possession of anyone under claim of right without making

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*In the last 25 years land in the San Pedro area has had a net subsidence of from 6 to 10 *feet*. A difference of 6 *inches* in the vertical position of the low tideline may result in as much as a mile or more in the horizontal extent of the area above or below the low tideline.

him a party or giving him an opportunity to be heard is a deprivation of property without due process of law.

Constitution of the United States, Fifth Amendment;

Morgan v. United States, 304 U. S. 1, 14.

2. In any action where it is sought to oust parties in possession of property the parties in possession are entitled to a trial by jury.

Even where by rule or statute there is but one form of action it merely abolishes procedural matters but not substantial rights.

Constitution of the United States, Seventh Amendment.

28 *U. S. C. A.,* Section 384:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

As was said by this Court in

Schoenthal v. Irving, 287 U. S. 92, 94:

"It (the foregoing Section) serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed."

28 *U. S. C. A.,* Section 343:

"The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."

The complaint in this case alleges that the United States is not in possession of these lands but that on the contrary the State is in possession either by itself or by its grantees or lessees.

Where plaintiff is not in possession and defendant is, the common law remedy of ejectment is adequate and equity has no jurisdiction.

Scott v. Neely, 140 U. S. 106;

Whitehead v. Shattuck, 138 U. S. 146.

It has been indicated, however, that there is an exception to this rule.

Where the principal value of land is oil or other mineral, or timber, and the value of the land to plaintiff is being destroyed by a trespasser, a court of equity will entertain an action to restrain trespass. Having once taken jurisdiction, the Chancellor will dispose of all the issues. Thus, in

Burkart v. Case, 39 F. (2d) 5, 7,

the only value of the land was timber and the very substance being destroyed, equity took jurisdiction.

Chanslor-Canfield v. United States, 266 Fed. 145, 147.

This was a case in which the only value of the land was oil. The United States was conceded to be the owner of the legal title and a court of equity took jurisdiction.

On the other hand, this court, in

United States v. Bitter Root Dev. Co., 200 U. S. 451, 472,

refused to take jurisdiction in equity on a timber case.

In some of the cases it is indicated that there must be no serious question about the plaintiff holding the title but in any event it is agreed in all instances that the prevention of waste must be the paramount consideration and it must appear that the very substance of the estate is being destroyed.

Constitutional and Statutory rights cannot be taken away under pretext or by *pro forma* proceeding.

Where the prime purpose of the case is to establish title or recover possession and equitable relief is merely ancillary and *pendente lite,* equity does not retain jurisdiction.

> *Big Six Development Co. v. Mitchell,* 138 Fed. 279, 282;
>
> *Chanslor-Canfield v. U. S.,* 266 Fed. 145, 147.

This was very well put in an Ohio case.

> "If the primary or paramount relief is legal and the equitable redress merely incidental, it is an action at law."
>
> *Nordin v. Coulton,* 51 N. E. (2d) 717, 718.

We respectfully submit that the case at bar does not fall within the exception for two reasons.

In the first place this action involves the title and right of possession to a strip of land 1,000 miles long and 3 miles wide, say, a total area of 3,000 *square miles.* The area to which it is sought to restrain waste, to-wit, the taking of oil, is 2545 *acres,* or less than one-tenth of one per cent of the entire area. An action which is merely applicable to one-tenth of one per cent of the entire area as to which it is sought to maintain title, can hardly be said

to be in the category where the estate is being destroyed or the total value of the land is lost to plaintiff. This is very frankly conceded by the Government in its brief. (See p. 165.) At that point the Government was answering a contention of the State of California that there were certain equities operating in favor of the oil lessees of the State who had spent large sums of money in developing these lands, and to this the learned Attorney General says:

> "But the possible existence of any equities in so relatively an insignificant portion of the total area of the marginal sea certainly should not preclude the United States from asserting its rights with respect to the area as a whole."

And, to this we may add, should not preclude defendants from asserting their rights to a trial by jury.

But, besides the claim of equitable relief applying to an insignificant portion of the total, there is more than this to the Government's position.

In the petition for leave to file the complaint, in his briefs and in the oral argument, the Attorney General has taken very high ground and it is urged that the suit is brought to vindicate the sovereignty of the national government to protect our citizens and in dealings with foreign nations it is essential that the United States be the owner of lands under the high seas below the line of low tide. Thus, in the motion for leave to file the complaint, page 4, the Attorney General said:

> "As rights in the three-mile belt, susceptible of possession and ownership, began to emerge subsequently, they emerged as property of the national

> sovereign, whose function it is to establish and vindicate those rights against the possible claims of other nations."

And, in his brief, on page 83, *et seq.*, the Attorney General said:

> "The first and most important of the purposes deemed to be served by the marginal sea, namely, the protection of the security of the coasts."

We have no reason or inclination to question the good faith of the Attorney General in making this statement, particularly as the decision of the court is strongly tinged with these considerations. Learned counsel has carefully avoided claiming that the main purpose of the suit is to stop the State and its lessees from destroying the land by the removal of oil or that the real purpose of the suit is to get 10% of the 12½% royalty for the benefit of the Interior Department.

We think it fair to say that the primary purpose of this suit is to adjudicate the lack of title or right of possession of the State of California, or anyone claiming under the State of California, to 3,000 square miles of land and that any injunctive relief asked is subordinate to the suit and wholly ancillary. This is confirmed by the fact that the Attorney General has not asked for an injunction *pendente lite* but has sought to insure the continued operation of these lands by the occupants pending this suit.

This being so, the case does not fall within the exception but under the general rule, to-wit, that if the plaintiff is out of possession the proceeding is one at common law and not in equity.

In response to any suggestion that the decision of this Court would not be binding on any occupants that are not parties thereto, may we quote from a very recent opinion of Mr. Justice Frankfurter in *Johnson v. United States,* decided February 9, 1948, 92 Law. Ed. Adv. Ops., 360, 367:

> "One cannot be unmindful that 'the radiating potencies of a decision may go beyond the actual holding.' *Hawks v. Hamill,* 288 U. S. 52, 58. * * * Lower Courts read the opinions of this Court with a not unnatural alertness to catch intimations beyond the precise *ratio decidendi.*"

In conclusion we submit that the Petition for Supplemental Decree for the determination of the boundary line by a Master in Chancery should not be granted.

(1) Because it deprives the occupants of their property rights without giving them their day in court.

(2) Because, if given their day in court, they are entitled to a trial by jury of the vicinage.

Respectfully submitted,

A. L. Weil,
Amicus Curiae.